

Information Law: Cases and Materials Volume Two

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Winter 2004

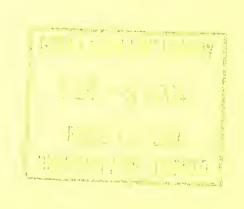
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¹ Most of the "Notes" in this volume were prepared by Rosslyn Young.

Notes

1. Columbia Ins. Co. v Seescandy.com 185 F.R.D. 573 (N.D. Cal. 1999)

In Columbia Ins. Co. v Seescandy.com, the court addresses the issue of an anonymous defendant and the actions that the court is willing to take to reveal the identity of the defendant in the civil proceedings. Columbia Insurance Co. was the assignee of the trademarks Seescandy and Seescandies; however the domain address seecandy.com was registered by someone other than the plaintiff. The identity of the defendant registrant of the domain name was unknown and the registration was listed with a series of California addresses, telephone numbers, email addresses and aliases. Columbia sued for various trademark and trade related infringements and sought an injunction against the use of the trademarked terms by the defendant; however the plaintiff had yet to ascertain the identity of the defendant and the court was faced with the difficulty of ordering an injunction against an unknown defendant and the possible, yet unusual, solution of ordering discovery prior to the commencement of proceedings in order to facilitate service on the defendant.

The ability to commit tortious acts anonymously through the internet presents special problems for legal proeecdings. In this seemingly simple ease, the court had to balance a series of competing factors that were made more difficult by the advent of internet technology. Discovery is generally not ordered prior to the commencement of proceedings and the "legitimate and valuable right to participate in online forums anonymously" must be balanced against injured parties' right to seek redress. In order to adequately address these eoncerns the eourt laid out a series of "safeguards" to ensure that discovery of an unknown defendant's identity is not misused. These include that the plaintiff should identify the defendant with sufficient specificity to determine if it's a real person or entity capable of being sued and that the plaintiff should outline all steps taken to identify the defendant to demonstrate good faith effort in having eomplied with service requirements. In addition, the plaintiff must demonstrate that the aet complained of gives rise to civil liability and that the discovery is aimed at identifying the individual who allegedly committed the act. For example, the anonymous defendant attempted to sell the plaintiff the domain names and included evidence of confused customers seeking information on See's candy from the websites and this was clear evidence of trademark infringement. Finally, the court ordered that the plaintiff should have 14 days to submit a request for discovery providing evidence of having fulfilled the above requirements.

2. McIntyre v Ohio Elections Commission 115 S. Ct. 1511 (1995)

The issue of anonymity and its connection to the values of freedom of speech was examined by the U.S. Supreme Court in *McIntyre v Ohio Elections Commission*. A provision of the Ohio Code prohibited the distribution of anonymous election materials and Mrs. McIntyre was fined by the Ohio Elections Commission under the provision for handing out handbills that encouraged people to vote against a proposed school tax levy. The handbills did not include the required name or contact information. Mrs. McIntyre ehallenged the fine as an unconstitutional violation of the First Amendment guarantee of free speech. Holding the purpose of the provision to be the important identification of

those who distribute materials containing false statements, the lower court upheld the infringement of the constitution because it was "reasonable" and "nondiscriminatory". The Supreme Court reversed this decision, holding that that the statue should be tested under a more severe standard because of the importance of the interest being affected. After examining the history of anonymous speech in the United States from pseudonymous authors to those who wrote in the Federalist Papers prior to the signing of the constitution, the court identified a "respected tradition of anonymity in the advocacy of political causes". The Ohio law was overly broad and did not just apply to libelous or false materials; rather it applied to all speech of a political nature. The fact that it identified speech by its content of 'core political speech' subjected it, in the opinion of the majority of the Supreme Court, to an exacting standard and the law did not withstand the constitutional violation. In short, the Supreme Court concluded that "Political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse".

3. Bahlieda v Santa (October 22, 2003, Ontario Court of Appeal)

This case addresses the issue of defamation on the internet and was on appeal from the respondent's successful motion for summary judgment. The incident involved a defamation suit for materials placed on a website and the lower court judge, Pierce J. found that material on the internet was a "broadcast" for the purposes of the Libel and Slander Act. However, because of s. 5(1) and 6 of the Act, the plaintiff did not file in the requisite time period and therefore the suit was statute barred. She held that "because the internet uses the same infrastructure as radio and television and because material placed on the internet via a website may be accessed by a large audience, such material constitutes broadcasting within the meaning of the Act". The Court of Appeal allowed the appeal for two reasons. First, Pierce J. did not consider that s. 5(1) and 6 applies only to "stations broadcasting in Ontario" and there was no determination as to whether this was applicable to this case. Secondly, there were contradictions in the experts giving opinions on the nature of the internet, including whether or not the term "dissemination" applies to the internet and also whether or not internet publication is immediate or transient. The court concluded that summary judgment is not a replacement for a trial when there are issues to be determined on the applicability of the law.

Notes

1) Remedies

In Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, the Supreme Court considered the issue of remedies for breach of confidence. Binnie J., for the Court, stated:

¶ 24 The result of Lac Minerals is to confirm jurisdiction in the courts in a breach of confidence action to grant a remedy dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations. See J. D. Davies, "Duties of Confidence and Loyalty", [1990] Lloyd's Mar. & Com. L.Q. 4, at p. 5:

There is much to be said for the majority view [in Lac Minerals] that, if a ground of liability is established, then the remedy that follows should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization.

...

While none of the judges who decided Lac Minerals advocated common law or statutory remedies for an action for breach of confidence, they did look to the underlying policy objectives of the various potential causes of action. They fastened on the particular circumstances that gave rise to liability in the case before them as governing the choice of remedy. That having been said, La Forest J., at p. 677, was at pains to avoid a "Chancellor's foot" approach to the choice of remedy:

I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to "some mix of judicial discretion . . . subjective views about which party 'ought to win' . . ., and 'the formless void of individual moral opinion". . . .

The emphasis on matching the remedy to underlying policy objectives was reiterated in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, per La Forest J. at p. 81, and per McLachlin J. at p. 86. It is in this sense, I think, that Sopinka J.'s statement in Lac Minerals (at p. 615) that "[t]he jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy", must be understood. In short, whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the appropriateness of a particular equitable remedy but does not limit the court's jurisdiction to grant it. Such a view is consistent with earlier cases in this Court, including Pre-Cam Exploration & Development Ltd. v. McTavish, [1966] S.C.R. 551.

2) Anonymous Information

Regina v Department of Health ex parte. Source Informatics Inc. [2001] QB 424

This case concerned the trade in anonymized prescription information originating from health practicioners. The applicant, Source, was engaged in the practice of collecting and reselling information from doctors and pharmacists on the types of drugs being prescribed and dispensed. The Department of Health had issued a policy document declaring the process an illegal breach of patient's confidence and it is the declarations in this document that were being contested. The court was faced with the issue of whether or not a pharmacist would breach his or her "undoubted duty of confidentiality to a patient if, having duly dispensed the medicine prescribed, he [or she] then uses the prescription form as the means of selling anonymized information to Source?"

Source had argued that the three elements of breach of confidentiality, that is that the information imparted be of a confidential nature, that the information must have been shared in circumstances giving rise to an obligation of confidence and finally that the misuse of the information had been to the detriment of the party who communicated it, were not applicable. It suggested that the patients did not have any confidence in anonymised information, that selling did not involve a misuse and that there was no detriment to patients because of the activity. The Department of Health, on the other hand, argued that a patient "is entitled to keep his ailments to himself" and that prescription information is imparted solely with the purpose to dispense medicine and therefore the activities of Source are against public policy.

In determining the outcome, the court first asked: what is the interest at stake or "what is the law here concerned to protect"? After determining that the law exists to protect the confider's personal privacy, the court found that the patient had no proprietary information in the prescription and so long as his or her personal privacy is protected, the pharmacists' subsequent sharing of the information does not pose a problem. The court suggested that should the Department of Health continue to find the procedure against public policy, it should seek a solution outside of the law of breach of confidence as the selling of anonymised prescription data involves no breach of duty owed by the pharmacists.

3) Employment Contracts and Confidential Information

Employers have a valid interest in protecting their confidential business information and trade secrets and this is increasingly important given the value of information in the knowledge-based economy. While this interest can be protected through non-disclosure and non-compete clauses in employment contracts, the nature of the high-tech and knowledge-based economy makes the practicality and enforcement of these covenants problematic. Separating trade secrets from learned employee skills and general industry knowledge becomes problematic. To further complicate this evolving area of law, companies have a conflicting interest in ensuring that their future employees are not unduly restricted by similar restrictive clauses in their prior employment contracts.

In the United States, treatment of non-disclosure clauses and restrictive covenants differs state by state. In general, restrictive covenants are not favoured, as they are viewed as restricting an individual's opportunity to pursue his or her livelihood; however, treatment depends on how the court views the reasonableness of the restrictions. Earlier conceptions of reasonableness might not fit the bill in the new high-tech industry. To illustrate, in a 1999 New York case, *Earthweb*

Inc. v Schlack², the court held that a one year non-compete covenant was too restrictive "given the nature of this industry, its lack of geographical borders, and Schlack's former cutting-edge position with Earthweb where his success depended on keeping abreast of daily changes in content on the Internet." While the court in Earthweb refused to redraft the contract given its overly broad restrictions, judicial suggestions of six months have been deemed appropriate for high-tech and Internet-based industries³. The court also refused to grant an injunction against Schlack based on the doctrine of inevitable disclosure, a controversial and recently emerging tool to cope with trade secret law in the new economy.

As with non-compete clauses, application of the trade secret law tool of the non-disclosure clause is far from uniform. Many states have adopted the *Uniform Trade Secrets Act (UTSA)* as a model for trade secret protection. The Act defines the elements of a trade secret and the circumstances when confidential business information has been misappropriated such that it is actionable; however, interpretation of the Act differs between states. Many states protect against actual and threatened disclosure of trade secrets, but there is a middle-ground that has been called "inevitable disclosure". Notably applied in the 1995 case, Pepsi Co. Inc v Redmond⁵, the doctrine of inevitable disclosure acts as a restrictive covenant under which former employers seek to restrict employees' future employment with competitors where their participation in the new company would automatically involve the disclosure of confidential information; in short, the argument is that you cannot erase what you know or have learned just because a contract says you must. While the doctrine has produced some favourable responses from academic and legal writers, it has generally not been upheld. In Earthweb, the court held that "the incvitable disclosure doctrine treads an exceedingly narrow path through judicially disfavoured territory. Absent evidence of actual misappropriation by an employee, the doctrine should be applied in only the rarest of cases". In a recent New York case, the court did not recognize the doctrine of inevitable disclosure and refused to restrict the former employee to "an implied-in-fact restrictive" covenant not to compete". While the doctrine would appear to offer a solution to businesses' interests in protecting confidential information in the face of an increasingly mobile and highly information-dependent workforce, its future remains to be definitively determined.

References

"To restrict or not to restrict—that is the question: Restrictive Covenants and Trade Secrets". Chapter 9. in *Fundamentals of Employment Law 2nd Ed.* American Bar Association (2000). Ford, Karen E. et. al. Ed.

Pasqualone, Danielle. "Intellectual Property: Trade Secret: 1. Employment Relationships: Globespan Inc v O'Neill" 17 Berkeley Tech. L.J. 251. (2002).

³ Doubleclick v. Henderson 1997 WL 731413 (N.Y. Supp. 1997)

² 71 F. Supp. 2d 299 (1999)

⁴ Saulino, Jennifer L. "Locating Inevitable Disclosure's Place in Trade Secret Analysis". 100 Mich. L. Rev. 1184 (March 2002). In addition to discussing the need for a clearer framework for the inevitable disclosure doctrine, Saulino suggests that the doctrine can be used to "fill the gap in standard trade secrets analysis between the highly protected status of trade secret and the unprotected status of employee general knowledge" (1187).

⁵ 54 F.3d 1262, 1264 (7th Cir. 1995).

⁶ Marietta Corp. v Fairhurst 2002 WL 31898398. The plaintiff former employer sought to restrict the defendant's new employment with a competitor on the basis of inevitable disclosure of trade secrets, including marketing strategies and other business plan information.

Saulino, Jennifer. "Locating Inevitable Disclosure's Place in Trade Secret Analysis". 100 Mich. L. Rev. 1184. (March 2002).

Appeals dismissed, with variations of trial judgments.

Notes

1.) Bill S-23: The Spam Control Act

Bill S-23, which has been through first reading in the Canadian Senate, provides for initiatives aimed at controlling Spam email. This enactment provides for initiatives to control spam on the Internet. It requires the Minister of Industry to initiate international consultation with other governments and report annually to Parliament on progress. It allows the Minister to establish an Internet Consumer Protection Council or designate an existing body to fulfill the role of the Council. The Council will set standards for its members and for procedures to be used to reduce spam. No person may operate an Internet service provider business without being a member of the Council. If the Minister is not satisfied with the Council's operation, the Minister may appoint directors and pass by-laws to administer it.

Any person may give a notice, to the Minister or the body to which the Minister delegates the responsibility, that they wish to be on a "no-spam list", and persons sending spam must first check to see if the address is on the "no-spam list". The list will not be a public document and the Minister will provide only negative information from it, for example, that an address is not on the list. Wherever a message is initiated, if it is received by a person in Canada it is deemed to have been sent to that person, and the act of sending it is deemed to have been carried out in Canada.

The enactment provides for offences and punishments that are more severe in respect of messages that involve pornography, explicit sexual activity or attempted fraud or that target children as receivers. It establishes a cause of civil action in nuisance for sending excessive spam and deems damage to have been caused if the volume is sufficient to cause inconvenience.

Summary from the Canadian Senate website: http://www.parl.gc.ca/37/2/parlbus/chambus/senate/bills/public/s-23/s-23_1/s23-e.htm

2.) U.S. Anti-Spam Efforts

Over 38 states have enacted anti-Spam legislation to date; however, many of these statues will have provisions that are pre-empted by the new federal CAN-SPAM Act of 2003, which is an acronym for "Controlling the Assault of Non-Solicited Pornography and Marketing". The Bill was signed by President Bush on December 16th, 2003 and went into effect on January 1st, 2004. The legislation authorizes, although does not require, a "do not mail" registry similar to the "do not call" registry already in operation in the U.S. and criminalizes the common practice of falsifying subject lines of spam in order to trick people into opening the text of the email.

While the Bill received almost unanimous approval before the House of Representatives, not all groups are as thrilled with the CAN-SPAM Act. Several net-

groups are critical of the Act's pre-emption of stricter state legislative regimes. For example, in California, individuals could participate in the process by investigating and filing a complaint to be pursued through the Federal Trade Commission (FTC) and this process is currently not afforded by the CAN-SPAM Act. In addition, the Act has been criticized as not being strong enough—as of the beginning of January, the media was reporting that spam in email inboxes was not abating. Critics of the Bill assert that regulation of unsolicited email is insufficient and only a prohibition will produce any noticeable change in the hundreds unwanted emails in peoples' inboxes.

3.) Do Not Call Registries

The National Do Not Call Registry is an American program aimed at limiting annoying calls from telemarketers. The program is managed by the Federal Trade Commission (FTC), the American agency responsible for consumer protection. It's operation is fairly simple: once a telephone number has been registered (which is done for free online or through the telephone) telemarketers calls should cease after three months, which is presumably the time for the telephone number to filter through the administration of the program to those making the calls. If calls continue past this date, consumers are encouraged to file complaints either online or through the toll-free telephone numbers. These complaints are then handled by the FTC, the Federal Communications Commission or appropriate state authorities.

As would be expected, telemarketers were not pleased with the government's efforts with the program and sought redress through the courts. On November 11th, 2003, the U.S. Court of Appeals for the Tenth Circuit heard a consolidated appeal from decisions by lower court judges that ruled against the FTC's registry. At issue was the constitutionality of the registry and the basic fairness of the plan that allowed political and charity calls but excluded commercial telemarketing. The suit was brought by a group of telemarketers alleging that the registry violates their First Amendment rights. The decision is pending.

In Canada, there is a private Do Not Call registry operated by the Canadian Marketing Association (CMA), an industry-based trade association. Consumers can register their telephone numbers with the CMA and its members are obligated to comply with the limitations of the registry with their telephone marketing efforts. Of course, membership in the organization is not mandatory and compliance is enforced only through the CMA, so this registry will not likely be as effective as the American government efforts.

4.) 1267623 Ontario Inc. v Nexx Online Inc [1999] O.J. No. 2246

The case involves an alleged breach of contract over provision of internet services between the plaintiff, an online marketer and the defendant, an internet services provider. The two parties entered into a contract in which the defendant agreed to provide internet services to the plaintiff; however, when the plaintiff began to engage in sending bulk email, or "spam", the defendant instructed the plaintiff to stop the practice or the service would cease. When the plaintiff continued to send bulk email, the defendant

disconnected the defendant's internet. The plaintiff brought a motion for interlocutory injunction requiring the defendant to continue to provide internet service.

The court dismissed the motion. The contract provided that the plaintiff "agrees to follow generally accepted 'Netiquette' when sending email messages...". Wilson J. defined Netiquette as "as the growing body of acceptable, though as yet largely unwritten, etiquette with respect to conduct by users of the Internet". While bulk email is not specifically prohibited by Netiquette, few internet service providers allow bulk email and in the U.S. anti-Spam legislation is increasingly common. Accordingly, the court found that unsolicited bulk email was against the emerging principles of Netiquette, unless directly provided for in the contract.

Notes

1.) Saccone v Orr (1981) 34 O.R. (2d) 317 and Provincial Privacy Statutes

In Saccone v Orr, an Ontario County Court decision, the plaintiff brought a suit against the defendant for broadcasting recorded conversations at a municipal meeting after the plaintiff has instructed the defendant not to play the recording in public. The court found the plaintiff required some right of recovery and "for want of a better description" the circumstances before the court were an invasion of privacy. The court went on to award damages in the amount of \$500.00 plus costs. The tort of invasion of privacy was also found actionable in a case decided by another Ontario court. In Roth v Roth (1991) 4 O.R. (3d) 740, a dispute over access to a road disintegrated into the defendant blocking the plaintiff's access to the road entirely. The defendant's objectionable conduct was found to be actionable as an invasion of privacy based on circumstances of the case.

While Ontario only has a tort of invasion of privacy at common law (although a the law has tended to followed English law in not recognizing a general tort of invasion of privacy), several provinces have legislation that provide for a statutory tort of invasion of privacy. These include British Columbia (*Privacy Act* R.S.B.C. 1979, c.336), Manitoba (*The Privacy Act* R.S.M. 1987, c. P125), Newfoundland (*Privacy Act* R.S.N. 1990 c. P22) and Saskatchewan (*The Privacy Act* R.S.S. 1978 c. P-24). In addition, s. 5 of Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. guarantees everyone the "right to respect for his private life".

2.) Wainwright v Home Office [2003] UKHL 53

Unlike in the United States, English law has not recognized a general tort of invasion of privacy. This was confirmed in the recent House of Lords decision in *Wainwright v Home Office*, which involved a suit brought by two visitors to a state-run prison. The plaintiffs, Mrs. Wainwright and her son, had been subjected to strip searches that were not conducted according to the prison guidelines, including no presentation of a consent form and inappropriate touching. The plaintiffs allege mental distress and psychological injury as a result of the experience. The trial court found in favour of the plaintiffs on the grounds trespass and battery; however, the Court of Appeal overturned the finding of trespass and reduced the awarded damages.

Arguments were made before the House of Lords that English law had always recognized "in theory" a tort of invasion of privacy and that such a finding was necessary in order to comply with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Lord Hoffman disagreed and held with the general line of English case law that refused to recognize a common law tort of invasion of privacy. Lord Hoffman agreed that the existing legal framework, which includes privacy as one of its underlying values, might have gaps; however, he asserted a generalized tort of invasion of privacy, such as that recognized in the American jurisprudence, would give rise to an "unacceptable degree of uncertainty". Lord Hoffman suggested that while English law is capable of recognizing underlying values, such as privacy, and developing accordingly, there is a difference between privacy as a value underlying the law and

privacy as a principle of law itself. The "gaps" between the laws that have privacy as an underlying value are better filled with detailed legislation than "the broad brush of common law principle". He then pointed to the recently enacted *Human Rights Act 1998* as a means by which Parliament had filled some of these "gaps", thus providing a remedy for violations of provisions of the *European Convention*.

3) Publicity Rights and Misappropriation of Personality

The tort of invasion of privacy is understood as protecting four separate branches of privacy, one of which is the right to be free from unauthorized use of one's identity for the benefit or use by another person, referred to as the tort of "appropriation". Recognized in the *Restatement (Second) of Tort*, section 652(c) provides that: "One who appropriates to his own use or benefit the names or likeness of another is subject to liability to the other for invasion of his privacy." The tort of appropriation has given rise to the "right to publicity", which has also been protected by the courts. The law's treatment of the right to publicity varies significantly between states and ranges from statutory protection to recognition at common law. In addition, the "right to publicity" has been treated as a form of property with the misappropriation being defined as a form of unfair competition. Courts' treatment of the right to publicity depends on the characterization of the right, with concepts or dignity prevailing under privacy and proof of exploitation and transfer rights remaining at issue when the right is considered in terms of property.

The right to publicity has given rise to some amusing cases in the United States. In *White v. Samsung Electronics America Inc. and David Deutch Associates*⁸, plaintiff Vanna White, the well-known game-show hostess, sued Samsung and its marketer, Deutch, for an ad depicting a robot in a blonde wig, dress and large jewelry on a set resembling the Wheel of Fortune game show set above the caption "Longest running game show 2012 A.D.". The court found that the ad had appropriated Ms. White's identity thereby violating her right to publicity. In addition, the court found that the ad created potential consumer confusion as to the plaintiff's endorsement of the product under the *Lanham Act* and awarded damages to Ms. White.

The judgment in *White* cites another amusingly titled case on publicity rights. *Carson v. Here's Johnny Portable Toilets*⁹ centered on the defendant company's use of the well-known variety show host's signature entrance tag. While the court held that there was no confusion as to Mr. Carson's possible endorsement of the portable toilets, the company did violate the night show host's publicity rights, not withstanding that the advertisement did not employ his name or likeness.

In Canada, the tort of misappropriation of personality was recognized in *Krouse v. Chrysler Canada*¹⁰ where Estey J. wrote that the law "does contemplate a concept in the law of torts which may be broadly classified as an appropriation of one's personality". In *Krouse*, Chrysler had included an action shot of a Hamilton Tiger Cat football game on its promotional team

¹⁰ 1 O.R. (2d) 225 (C.A. 1974)

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⁷ Restatement of the Law (Third) of Unfair Competition s. 46-49; Section 46 provides that "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in s. 48 and 49."

⁸ 1992 U.S. App. Lexis 17205

⁹ 698 F. 2d 831 (6th Cir. 1983)

identification "Spotter". In the photograph, only Krouse's number was visible and he brought the suit against Chrysler alleging that the defendant had used his image and personality to its commercial advantage. The court found that the photograph was being used legally and that as professional athletes, football players must be accustomed to a certain degree of publicity. In addition, the photograph does not lead to any possible consumer misunderstanding concerning Krouse's unauthorized endorsement of Chrysler. While the court found that the suit gave rise to a new cause of action, that is the misappropriation of personality, it did not find that Chrysler had misappropriated Krouse's image in the facts of the case.

Following Krouse, the court endorsed the tort of misappropriation of personality in Athans v. Canadian Adventure Camps¹¹. George Athans was a world-class water-skier who marketed his image using a particular pose. The defendant employed one of Athans's photographs to sketch a picture of a water-skier for its promotional brochurc and Athans sued for misappropriation of his personality, asserting that the sketch was recognizable as his marketable image. While the court found that it was unlikely that readers of the brochure would either recognize Athans or infer his association with the camp, the defendants did use his image for commercial purposes and therefore misappropriated his personality.

In a more recent case, Gould Estate v Stoddard Publishing Co. 12 the court found that in interpreting the tort of misappropriation of personality, there's a distinction between material used for sales and material used as subject in the public interest. In Gould, the defendant had published a book using photographs and conversations originating with a reporter's interview with Glenn Gould early in his career. While the materials were originally intended and used for a magazine article, the author included them in the contentious book years after Gould had died. Turning to American and Canadian jurisprudence, the court found that the tort of misappropriation of personality has limits set by the conflicting right to freedom of expression and the balance falls along the sales vs. subject divide. If the use of the plaintiff's identity is for the commercial advantage of the defendant, the actions fall within the ambit of the tort; whereas, when the use is the *subject* of the work in question, such as a biography, the public interest in freedom of expression and access to information on relevant public and social issues takes precedence. In Gould, the defendant had Gould's permission in the creation of the materials at issue and "there is public interest in knowing more about one of Canada's musical geniuses". The court held that the materials' use in the retrospective book does not give rise to the tort of misappropriation of personality.

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Restatement of Law (Third) of Unfair Competition ss. 46-49.

Restatement (Second) of Torts s. 652c

¹¹ 17 O.R. (2d) 425 (H.C. 1977) ¹² 30 O.R. (3d) 520 (G.D. 1996)



